

THE
ASSOCIATION OF TOWNS
OF THE
STATE OF NEW YORK

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NOV- 5 1997

Telephone
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October 30, 1997

Office of the Secretary
Federal Communications Commission
1919 M. Street NW
Washington DC 20554

Dear Secretary:

I am writing in hopes that you will consider the enclosed comments for MM. Docket No. 97-182 regarding preemption of zoning of DTV towers. I faxed copies of these comments on October 30, 1997 in order to comply with the posted deadline. It is my understanding that the FCC accepts informal comments via fax. I received this information from the FCC's Focus on State and Local Government Issues Web page. (<http://www.fcc.gov/statelocal/welcome.html>). I have enclosed a hard copy of this information for your review.

Thank you in advance for your consideration of this matter.

Kindest regards,



G. Jeffrey Haber
Executive Director

c. Susanna Zwerling, Policy and Rules Division, Mass Media Bureau
c. Keith Larson, Assistant Bureau Chief for Engineering, Mass Media Bureau

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FCC Focus on State and Local Government Issues

Federal Communications Commission

16 October 1997

The Telecommunications Act of 1996 directs the FCC and the state commissions to take on many new assignments in order to expand the frontier of competition in communications. Many provisions of the Act remove old walls that separated interstate and intrastate assignments and require an even closer working relationship between the FCC and the state, city and local governments. In a 10/7/96 speech to the International Municipal lawyers Association in Little Rock, Arkansas, FCC Chief of Staff Blair Levin announced the creation of this page to provide local governments with a central source of information on FCC proceedings of the most interest to them. Email your comments about this page to stateloc@fcc.gov.

[Telecom Act](#) | [Implementation Schedule](#) | [Speeches](#) | [FCC Documents](#) | [How to Participate](#)
[Advisory Committee Members](#) | [Local Gov Contacts](#)

What's New

- FCC releases NPRM on Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities (MM Docket No. 97-182, FCC 97-296). 8/21/97
- Chairman Hundt meets with the FCC State and Local Advisory Committee; Discussed Impact of Telecom Act on State and Local Communities. 3/13/97
- Chairman Hundt Appoints Members to the Local and State Government Advisory Committee. 3/13/97
- FCC requests nominations for membership on the Local And State Government Advisory Committee. 3/3/97

Advisory Committee Recommendations

- Recommendation #1

Information on How to Participate in the FCC Process

- Where to Begin the Paper Chase [[text version](#) | [WordPerfect version](#)]
 - How to Tell Your NOIs from Your NPRMs [[text version](#) | [WordPerfect version](#)]
 - Now It's Your Turn: How to Comment [[text version](#) | [WordPerfect version](#)] ✓
 - [FCC's Exparte Rules](#)
 - Daily Digest on Listserver [[text version](#) | [WordPerfect version](#)]
 - FCC Internet Features [[text version](#) | [WordPerfect version](#)]
 - Sample Comment Cover [[text version](#) | [WordPerfect version](#)]
 - How to Get FCC Information Sent to Your FAX Machine [[text version](#) | [WordPerfect version](#)]
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Advisory Committee Members

Chairperson: **Kenneth Fellman**
 Vice Chairperson: **Marilyn J. Praisner**

The Honorable Victor Ashe Mayor of Knoxville City County Building Knoxville, TN 37902 Phone: (423) 215-2040	The Honorable Darryl T. Owens Commissioner, Jefferson County, KY 527 West Jefferson, Suite 202 Louisville, KY 40202 Phone: (502) 574-6808 email: dowens@unidial.com
The Honorable Bill Campbell Mayor of Atlanta 68 Mitchell Street, SW, #2400 Atlanta, GA 30335-0300 Phone: (404) 330-6021	Mary Poss Mayor Pro-Tem City of Dallas 1500 Marilla, 5FN Dallas, TX 75201 Phone: (214) 670-4069 email: mary@dallastex.com
Kenneth S. Fellman, Esq. City Council Member, Arvada, CO Kissinger & Fellman, P.C. Parmigan Place, Suite 900 3773 Cherry Creek North Drive Denver, CO 80209 Phone: (303) 320-6100 email: kfellman@kandf.com	The Honorable Marilyn J. Praisner President, Montgomery County Council 100 Maryland Avenue Rockville, MD 20850 Phone: (301) 217-7968 email: marilyn.praisner@co.mo.md.us

How to Participate

In the FCC Process

Panel IV--Now It's Your Turn: How to Comment

The Federal Communications Commission seeks comments from the public on proceedings and proposed rule makings before the Commission. Individuals interested in commenting on proceedings may do so in various forms. Often people do not comment on items of interest to them because they fear that comments must be prepared and filed by an attorney. This is not the case. You do not have to hire the services of an attorney to prepare comments.

You or any representative of your company may prepare and file comments. You do not need an attorney in order to participate in the FCC rule making process or to "let your voice be heard" at the FCC. Comments may be in the form of a short statement or brief letter. However, comments may also be detailed documents prepared by an outside law firm or your company's in-house counsel.

One important item to remember: You must include the docket number, or rule making number, on your comments for the proceeding on which you are commenting. If you do not know the docket number, contact the Office of Public Affairs, Public Service Division at (202) 418-0260 or the Bureau/Office responsible for the item. The docket number is critical to make sure your comments are considered, no matter how you submit them.

There are two basic types of comments: formal and **informal comments**. The main difference between formal and informal comments is the number of copies that are filed with the Commission. In filing formal comments, an original plus four copies of your comments must be delivered, by mail or by hand, to the Office of the Secretary, 1919 M Street, room 222, NW, Washington, DC 20554.

The Secretary's Office hours of operation are Monday- Friday (except government holidays) 8:00 am - 5:30 pm. Comments must be filed in the Secretary's Office by 5:30 pm on the deadline date. (The comment and reply comment deadline dates are usually noted on the first page of a Notice of Proposed Rule Making or Notice of Inquiry. If you need to verify a comment deadline date, please contact the relevant Bureau/Office.) If you would like your formal comments to be circulated to the Commissioners, an original and nine (9) copies must be submitted.

The Commission also accepts comments via e-mail or fax. If you file your comments via e-mail or fax or in the form of a letter without the extra four copies, they will be considered "informal" comments. That means that your comments will not be as widely distributed within the FCC for review.

You should also be aware that in some instances we have requested copies of comments to be filed on disk in addition to the paper copies. This has been of tremendous value because it enables us to make comments available on the Internet. This has provided greater access to information, especially for individuals not located in the Washington, DC area. It has made it easier for others to review the record, provide reply comments and to better understand and evaluate the issues. So keep in mind, when we ask for comments to also be submitted on a diskette, it helps us help you.

To encourage your participation in our rule making process, we are, in specific proceedings, encouraging comments to be submitted via electronic mail. The Commission will address these issues in a comprehensive fashion later this year. (The Commission will sponsor an open forum on the use of the Commission's Internet site on June 24th. For more information

about this forum, please call the Office of Public Affairs, Public Service Division on (202) 418-0260.) Individuals interested in filing e-mail comments should contact the person listed in the Notice or the Secretary's office on (202) 418-0300 to see if an electronic mail box has been set up for the proceeding on which you wish to comment.

Some helpful guidelines for filing informal vs. formal comments:

If you file e-mail comments and would like them to be treated as "formal" please print out your comments and send the original plus four copies to the Secretary's office by the stated deadline. If you cannot get your comments in on time this way, or if it is a choice of commenting informally or not commenting at all, please send your comments however you can and follow up with a phone call to ensure receipt.

For example, contact the Public Service Division if you have e-mailed your comments to our main mailbox. If you have sent the comments directly to the Bureau handling that proceeding, call them to follow up. If you have faxed your comments or sent in a letter, call and make sure the information was received. Following up a fax by mailing an original plus four copies of your comments by the deadline ensures that they will be considered "formal".

If you require assistance or have any questions about how to file comments, please contact the FCC Office of Public Affairs, Public Service Division or the Office of the Secretary. More information on how to file comments can be found in 47 Code of Federal Regulations, Sec. 1.399- 1.430 regarding FCC Rule making proceedings.

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In the Matter of

Preemption of State and Local Zoning and
Land Use Restrictions on the Siting,
Placement and Construction of Broadcast
Station Transmission Facilities

MM Docket No. 97-182

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Comments of

Association of Towns of the State of New York
146 State Street Albany New York 12207
Phone: (518) 465-7933 * Fax: (518) 465-0724

The Association of Towns of the State of New York files these comments on October 30, 1997 for your consideration regarding the FCC's Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities (MM Docket No. 97-182).

The Association of Towns of the State of New York (AOTSNY) is a not-for-profit association of town governments in the State of New York. New York State has both suburban and rural towns. We would like to submit the following comments on the aforementioned proposed rule regarding the siting of digital television (DTV) towers.

1. The membership of the AOTSNY is devoted to preserving home rule and thus maintaining local authority over land use decisions.
2. The United States Supreme Court acknowledged that land use decisions do not occur in a vacuum. "...the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality." *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365, (1926) citing *Sturgis v. Bridgeman*, L.R. 11 Ch. 852, 865.
3. The FCC, although knowledgeable about the technology of television broadcast facilities such as DTV towers, could not be knowledgeable about the character and environment of every community. It would be impossible for the FCC to balance the best interests of the citizenry with the advancement of new technologies without the knowledge and experience that is unique to local decision makers.
4. Therefore we oppose a rule that would preempt current local government authority over the siting of broadcast transmission facilities.
5. We would like to comment further that preempting DTV towers is not akin to preemption of small satellite dishes in that DTV towers can reach monstrous heights of 2000 feet and would thus considerably alter the character and quality of life of a community.
6. If the FCC should choose to proceed with preemption we would like to stress that the NBA/AMST proposed rule is not workable in practice. Governing is a deliberative and participatory process. The structure and practice of zoning is designed to include the public as well as the applicant. Public involvement requires notice, an opportunity to be heard and deliberation. Local government decision makers are constitutionally prohibited from acting arbitrarily or capriciously – if the FCC requires them to process an application in the proposed time frames (21, 30 or 45 days) they will have no choice but to violate constitutional mandates or risk default approval.

MM Docket No. 97-182 – Notice of Proposed Rule Making in the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities.

7. Zoning is a product of a municipality's police powers. Land use decisions must be made in furtherance of the public health, safety and general welfare. In 1954, the United States Supreme Court wrote "[t]he concept of public welfare is broad and inclusive ... [t]he values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker* 348 U.S. 26, 33, (1954). The NBA proposed rule seeks to eliminate two important elements in zoning methodology – namely protection of the public health and general welfare. Essentially, the local decision makers would only be able to process an application based upon safety consideration. Although safety is an important aspect to a zoning decision – it does not address, property values, quality of life, and environmental affects such as storm water run off.

8. The NBA/AMST proposed definition of broadcast transmission facilities set forth in paragraph (f) subparagraph (i) appears to include all federally authorized radio or television broadcast facilities. This rule, if adopted, should be exclusive to broadcast facilities constructed or used specifically for the purpose of providing DTV and for no other purpose. We would also request that the rule require the applicant show that the facility will be used for DTV purposes only.

9. The NBA/AMST proposed rule would authorize the applicant to appeal any unpalatable decision to an FCC arbitrator. Local governments are not familiar with the FCC administrative process nor are they able to prepare a defense in the stated time frames. Furthermore, local governments should not be expected to incur travel and legal costs to defend their decisions in front of the FCC when local judges have been adjudicating land use disputes successfully.

10. We are uncertain if the NBA/AMST proposed rule would preempt compliance with State environmental review. For example, in New York State any structure 100 feet or higher is subject to a State environmental review. If State environmental review were preempted -- what agency or entity would be responsible for controlling potential adverse impacts on the environment unrelated to RF emissions, such as storm water run off.

11. Finally, we would request that the FCC follow the recommendations of the FCC Local and State Government Advisory Committee as set forth in Recommendation Number 3 filed on May 30, 1997.

Submitted by:



G. Jeffrey Haber
Executive Director
Association of Towns of the State of New York
146 State Street Albany New York 12207
October 30, 1997